

*11/11/90 - 11/11/90*



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** East West Research, Inc.

**File:** B-237844

**Date:** February 28, 1990

Richard Snyder, for the protester.  
Louise E. Hansen, Esq., Office of the General Counsel,  
Defense Logistics Agency, for the agency.  
Jennifer Westfall-McGrail, Esq., and Christine S. Melody,  
Esq., Office of the General Counsel, GAO, participated in  
the preparation of the decision.

### DIGEST

1. Where request for proposals specified an acceptable brand name product and permitted offers of alternate products identical to or completely interchangeable with the specified product, agency properly rejected alternate product offered by protester which did not have certain physical characteristics of the specified item and was not the functional equivalent of it.
2. Protest that item description should have incorporated American National Standards Institute standard rather than specifying an acceptable brand name product and permitting offers of alternate products interchangeable with the specified one is dismissed as untimely where not filed prior to the closing date for receipt of proposals.

### DECISION

East West Research, Inc., protests the rejection of its offer under request for proposals (RFP) No. DLA400-89-R-2406, issued by the Defense General Supply Center for industrial chemical splash goggles. The RFP specified an acceptable brand name model of goggles manufactured by Midland Safety Products, Inc., and permitted offers of alternate products interchangeable with the specified model. East West contends that the agency unreasonably determined that the goggles it offered were not an acceptable alternative.

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We deny the protest in part and dismiss it in part.

The RFP solicited offers on several alternative quantities of goggles to be shipped to three different locations. The RFP explained that the designated model, Midland Safety Products part No. 01-4002-58, had been determined to be acceptable and that the government lacked detailed specifications or sufficient data to determine the acceptability of other products; accordingly, the solicitation provided that while offers of alternate products would be considered, any alternate would have to be "either identical to or physically, mechanically, electrically and functionally interchangeable" with the named product.

Nine offerors submitted offers by the May 3, 1989, closing date. The agency subsequently decided to acquire the third alternate quantities cited in the RFP. The four lowest offerors were as follows:

<u>Offeror</u>	<u>Unit Price</u>
Native American Trading Corp.	\$2.32
Gateway/AM SAFE	\$2.42
East West	\$2.60
IPC	\$3.10

The lowest offeror, Native American, offered an alternate product, H.L. Bouton Co., Inc., part No. 5600300, which the agency determined to be technically acceptable. The contracting officer was unable to make an affirmative determination regarding the firm's responsibility, however, and since Native American declined to apply to the Small Business Administration for a Certificate of Competency, its offer was rejected.

The second-low offeror, Gateway, offered to furnish its alternate part No. 104F, which was rejected as technically unacceptable. East West, which was next low, offered Sellstrom Manufacturing Company part No. 882LFP, which was also determined to be technically unacceptable. The fourth-low offeror, IPC, offered to furnish another alternate product, Uvex part No. 9305GVA, which the agency determined to be technically acceptable. On October 30, the agency awarded a contract to IPC.

East West filed an agency-level protest objecting to the evaluation of its offer on August 2. By letter dated November 16, the contracting officer denied the protest, explaining that the Sellstrom goggles offered by East West did not have the required form of indirect ventilation, i.e., molded-in vents, and that its lenses were flat, rather

than curved, as required. East West protested to our Office on November 21.

As a preliminary matter, the agency argues that we should dismiss East West's protest as untimely because the protester did not diligently pursue the protest. The agency contends, citing our decision in East West Research, Inc., B-236515, Nov. 30, 1989, 89-2 CPD ¶ 510, that where a protester initially files an agency-level protest, it may wait only a reasonable length of time for the agency's response before filing a protest with our Office. Here, the agency argues, close to 4 months, which was not a reasonable length of time, elapsed between East West's filing of its agency-level protest and its protest to our Office.

Under the circumstances here, we do not think that East West can be said to have failed to pursue its protest diligently. First, the agency informed East West by letter dated August 16, that it anticipated resolving its agency-level protest within 60 days. Thus, we do not think that East West would have had any reason to anticipate a response from the agency prior to mid-October. Furthermore, East West notes that it monitored the status of its agency-level protest on a monthly basis by telephone, but was repeatedly informed that the contracting officer was awaiting a response from the agency's technical evaluators. Given that East West did monitor its agency-level protest on a regular basis, we think that its pursuit of the protest was sufficiently diligent; we therefore decline to dismiss the protest as untimely.

The agency also argues that East West is not an interested party to pursue the protest since the protester allowed its offer to expire on September 2. We disagree. In our view, East West's pursuit of the protest provides evidence of its intent to extend its offer acceptance period and to be bound by the offer if the protest were sustained. Carothers Constr., Inc., B-235910, Oct. 11, 1989, 89-2 CPD ¶ 338.

East West contends that although the Sellstrom goggles that it offered differ from the Midland Safety Products goggles referenced in the item description in that they have round vent holes with snap-in plugs, rather than molded-in vents, and flat, rather than curved, lenses, these differences in design have no significance since the Sellstrom goggles are functionally equivalent to the Midland ones. According to the protester, the physical characteristics of an item are irrelevant so long as the item can perform the same function as the named item.

The protester misunderstands the fundamental nature of this procurement. This is not a "brand name or equal" procurement, and thus the issue is not simply whether the performance capabilities of the offered product can be reasonably equated to those of the brand name product referenced. Here, instead of employing a brand name or equal clause with listed salient characteristics, the solicitation specified that any nonidentical product offered must be physically, mechanically, electrically, and functionally interchangeable with the product cited in the item description. Thus, contrary to the protester's argument, not only was an alternate item required to be the functional equivalent of the referenced one, it was also required to have the same physical characteristics. See Hobart Brothers Co., B-222579, July 28, 1986, 86-2 CPD ¶ 120.

In any event, the agency argues, the Sellstrom goggles are not the functional equivalent of the Midland ones. According to the agency, the difference between vents with plugs and molded-in vents is not simply one of design; rather, the agency contends, the difference also relates to performance since the goggles with molded-in vents provide better protection against chemicals entering the eye. The agency explains that liquids are more likely to enter a goggle with plug vents since the plugs can come out; the agency also notes that in the event that liquids do in fact enter the goggles, the molded-in vents provide better protection since they have channels that direct the liquids away from the eye and allow them to drain out of the bottom of the goggle. The agency also claims that the molded-in vents distribute the airflow across the surface of the lenses more evenly than the plug vents, which enhances the goggles' anti-fogging effect. With regard to the shape of the lens, the agency contends that a curved lens is superior to a flat lens since it provides the wearer with better peripheral vision.

The protester argues in response that the advantages cited by the agency of molded-in venting over plug vents and of curved lenses over flat lenses are "nonsense" and that if these features in fact enhanced the goggles' safety, they would have been incorporated into American National Standards Institute (ANSI) standard Z87.1-1979, which governs occupational and educational eye and face protection.<sup>1/</sup>

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<sup>1/</sup> The agency points out that ANSI standard Z87.1-1979 has been superseded by ANSI standard Z87.1-1989.

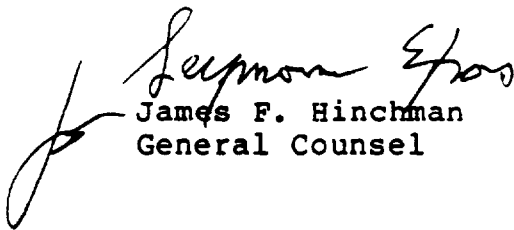
Although the protester disputes the alleged advantages of molded-in vents and curved lenses, it has furnished us with no evidence in support of its position that the plug vents are as safe as molded-in ones or that flat lenses provide the same degree of peripheral vision as curved ones. With regard to the protester's argument that these features would be required by ANSI standard Z87.1-1979, if they in fact enhanced goggle safety, we note that the ANSI standard sets out certain minimum requirements for the goggles but does not dictate every aspect of their design.

In its comments on the agency report, the protester further argues that the item description should have incorporated ANSI standard Z87.1-1979 rather than citing the Midland part number. According to the protester, by not using a generic item description, the agency has created a sole-source acquisition.

We dismiss this basis of protest as untimely. Our Bid Protest Regulations require that a protest based upon an alleged impropriety in a solicitation which is apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1) (1989). Here, proposals were due by May 3, but East West did not object to the item description until approximately 8 months later, in January 1990. This ground is therefore untimely.

In any event, the agency's reference to the Midland part, together with the alternate products clause, did not result in a sole-source acquisition, as the protester suggests. As previously noted, two alternate products, H.L. Bouton Co., Inc., part No. 5600300 and Uvex part No. 9305GVA, were determined to be technically acceptable, and award was in fact made to an offeror offering the Uvex model.

The protest is denied in part and dismissed in part.

  
James F. Hinchman  
General Counsel